In the

# Supreme Court of the United States

October Term, 1966

No. 968

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DAVE ROSENTHAL,

*Petitioner,*

—vs.—

COMMONWEALTH OF VIRGINIA,

*Respondent.*

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## REPLY BRIEF TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

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No. 366

DAVE ROSENBLOOM,

*Petitioner,*

—vs.—

COMMONWEALTH OF VIRGINIA,

*Respondent.*

## REPLY BRIEF TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

*To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:*

The Commonwealth of Virginia prays that the petition for a writ of certiorari be dismissed in the above styled case.

## STATEMENT OF FACTS

The defendant, Dave Rosenbloom, hereinafter sometimes referred to as the petitioner is the owner and operator of a retail bookstore in the City of Richmond, Virginia, and trades under the trade name of The Booktrader. In his business he sells various and numerous books and magazines.

Officer N. J. Hunt on October 23, 1964, entered the petitioner's store and purchased from him a magazine entitled "Solis" which is written entirely in the German language

and has many pictures of nude women, men and children. Most of the pictures in the magazine are of young shapely women and exposes their bodies in its entirety without any clothing.

Subsequent to the purchase of the magazines the search warrant was obtained by the police and 107 magazines were confiscated under the search warrant and all of them so seized were the so-called nudist magazines. The magazines in question were wrapped in a transparent wrapper and the prices were greatly increased over the publisher's suggested retail price. The defendant admits that these magazines were not purchased in Richmond, Virginia but came from California and New Jersey and that he had paid for these magazines by check.

The petitioner was arrested and charged with violation of Section 18.1-228, the Code of Virginia, 1950 as amended.

Since the testimony and proceedings in the lower court is covered by the petition for a writ of certiorari they will not be reiterated at this time because it would only be redundant and unnecessary. The code sections in question are also in the petitioner's brief.

## REASONS FOR NOT GRANTING THE WRIT OF CERTIORARI

The definition of obscenity is found in Section 18.1-227 of the Code of Virginia, 1950 and is as follows:

> "§ 18.1-227. 'Obscene' defined.—The word 'obscene' where it appears in this article shall mean that which considered as a whole has as its dominant theme of purpose an appeal to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters."

It is apparent from reading the Roth case and the above statute that the statute was taken from the Roth decision. It appears that all the Court has to do is determine whether the magazine in the evidence comes within this decision and if so then the material is obscene and does not come within the protection of the free speech and press in the state or federal constitution. From casual observation it is apparent that the magazine seized by the police fall within the definition of obscene as defined in the Virginia Code. The overwhelming amount of the pictures are of nude women, many of them being in suggestive positions and appeal to a shameful and morbid interest in nudity, sex or excretion, and goes substantially beyond customary limits of candor in the description and representation of such matters. The pictures in the magazines in no way bring or aid in bringing about political and social changes desired by the people.

The Arkansas Supreme Court in the case of Gent v. State decided May 2, 1965, held the following in light of *Jacobellis* v. *Ohio,* 378 U.S. 184:

> "Perhaps we lack sophistication, but, to us, articles, which, for example, indicate that our colleges are simply play-grounds for the indulgence of sexual pleasures, are completely obscene, and totally without any redeeming feature. Of course, we are not cognizant of the standards of Washington, New York, Chicago, or San Francisco, nor is there any way for us to know the 'standard' of the nation at large, but we think the evidence clearly established that the contents of the magazines in question are not compatible with the contemporary community standards in Pine Bluff, Arkansas."

These pictures go far beyond the community standards of decency of the Commonwealth of Virginia in general and the City of Richmond in particular and have no redeeming social value.

All of the witnesses called by the defense stated that they

felt it would be wrong for a nude woman or man to appear in public. In fact, they agreed that society should be protected from this action. It is hard to distinguish a live person from the pictures appearing in the magazine.

Two witnesses called by the defendant who were nudist and ran a nudist camp testified that their membership was restricted and a person could only attend the camp after making application thereto and it being approved by the owners of the camp. They further testified that their camp was run away from the public view and the only way you could gain admittance was by invitation from the owners. The Commonwealth contends that this testimony by witnesses called on behalf of the defendant proves beyond a reasonable doubt that the public at large must be protected in such matters.

The Court has no right to interfere with beliefs and thoughts and the communication of these beliefs and thoughts from person to person so long as it does further some social or political belief. However, the law may regulate certain actions for the safety of the public in the furtherance of such beliefs. In the case of *Kirk* vs. *Commonwealth,* 186 Va. 839 at page 845 our Court said the law cannot interefere with a person's religious beliefs or opinions *but* this is no excuse for illegal actions made criminal by the law of the land even though such act is based on conscientious religious belief. The Court then cited with authority the following:

> "As said by Chief Justice Waite in Reynolds vs. United States, 98 U.S. 145, 25 L. Ed. 244, 250: 'Laws are made for the government of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with practices. * * * Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed

> doctrine of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.' See also, *Jones* v. *Opelike*, 316 U.S. 584, 62 S. 1231, 86 L. Ed. 1691."

The guarantee of the constitution of Virginia and the United States, so far as freedom of religion, speech and press, are very similar in their application and neither should be suppressed by the government unless there is a clear, concise and public need so to do and this should be only exercised when the public demand is so great that it is absolutely necessary for an orderly society to survive. The Commonwealth contends that people may practice nudism, read and exchange ideas, but the public has a right to keep the rattle snakes of obscenity out of the public square where its venom will poison the minds of men, women and children and materially affect the moral beliefs of the people. Public morality has been the cornerstone of our republic and must be protected.

It appears the sole question for the court to decide is where society draws the line between what is for the furtherance of a political or social change and the protection of the people at large. From the evidence it is clear and beyond any doubt that the people who are dedicated to their beliefs readily admit that public at large has not reached a point where it can adequately accept the pictures of nude women being sold from every drug store, confectionary and bookstore within our City, State and Country.

To say that these magazines are not obscene would allow persons to go one step further and actually show by pictures the most intimate relations between men and women under the theory that this is for a social purpose. This would open the flood gates to obscenity which would materially alter the moral standards and beliefs of the people of this country.

The idea that these magazines are for the purpose to assist nudists in their beliefs is so much manure and not enough grass.

The New Jersey Superior Court held on December 9, 1964, in *G. P. Putnam's* v. *Galissi* in granting the County Prosecutor an injunction banning the sale of "Fanny Hill" the following:

> "Free rein should not be given under the guise of constitutional guarantees to vilely depict perversions and sexual adventures as John Cleland author of Fanny Hill saw fit 200 years ago. This is not the highway to a better constitutional world; it is rather the path to decay and decline. The Constitution should not be the sword of a shameful profiteer of filth. It must be the shield to protect our sense of moral decency."

The cases cited by the defendant only show that a person is entitled to his day in court, which the defendant has had here. The burden rests on the state to show that the material is obscene and not upon the defendant to prove they are not. In the instant case this was done.

The nudist idea behind these magazines is only subterfuge and is not the real issue before the Court. To be a nudist or not lies within a man's own conscience, but the sale of such magazines in public is a matter of all the people. As long as the Virginia Obscenity statute is constitutional then these magazines come under it for the protection of the people.

The defendant relies heavily on the *Sunshine Book Co., et al.* v. *Summerfield,* 355 U.S. 372 (1958). However, this case cannot be controlling as it is a per curiam decision by the Supreme Court and no reasons for the decision are set out in the opinion. To say that this Court approved all nudist publications by the above mentioned decision would

completely ignore other decisions of the Court.

The case against the commercial nudist magazine vendor is realistically portrayed by the Missouri Supreme Court in *State* v. *Volmar,* 389 S.W. 2d 20, at page 28:

> "All of the books purport to describe nudist organizations and to advocate the practice of nudity. However, we have concluded from an examination of the contents and arrangement of these books that the advocacy of nudity therein is a mere pretext or feint whereby publishers and distributors of obscene publications seek to avoid successful prosecution and punishment under obscenity statutes such as the one under consideration.
>
> All of the books are replete with actual photographs of nude persons of both sexes, many of which clearly depict both male and female genitalia, including the pubic hair. Some of the pictures show nude persons of all ages engaged in the normal group activities that apparently characterize the usual nudist park. However, predominating in all of these publications are close-up photographs of attractive, shapely, young women, most of them apparently range in age from 16 to 25 years. These photographs are posed so as to portray both the face and figure of these young women in a most alluring manner. Most of those photographs are of the front view and, as stated by one of the witnesses, 'show everything.' Some show one nude woman on a double page in order to depict a closer view of her body than could be done on one page. See, for example, "National Nudist," pages 27, 28. While these are not necessarilly poses suggestive of sexual intercourse, one would be naive indeed to conclude that pictures of that type would not arouse the prurient interest of the average man. A considerable number of the photographs are in color which, of course, make the nude person appear more natural and would likely increase the prurient appeal * * *

> While no doubt there are some people who sincerely believe that the practice of nudism is beneficial and desirable, it is unquestioned that we live today in a clothed civilization and the average normal American (regardless of where he may reside), except for legitimate works of art, etc., regards complete nudity, especially when it brazenly exhibits the adult male and female genitalia, as shocking, vulgar, and indecent. We have considered each of the exhibits in this case in its entirety and have concluded that each must be characterized as obscene. The dominant theme of each is to display the sex organs and nude bodies of attractive young people in a manner that will appeal to the prurient interest of the average person (applying contemporary community standards) in this nation. We accordingly rule that the trial court did not err in overruling defendant's motions for judgment of acquittal."

The holding in *Ginzburg* vs. *United States,* 383, U.S., 463 (March 21, 1966) cannot be overlooked in the decision of any obscenity case. To analyze the facts in the instant case we find the petitioner falls clearly within the holding of Ginzburg. How could the petitioner foster the nudist movement by a publication written solely in the German language when there aren't but very few persons in this locality who could read the publication. Therefore, the only benefit that this magazine could have would be the pictures which showed young women, men and children in the nude. The publications being wrapped in a transparent cover would make the buyer believe that the interior of the publications were much worse than the display of nudity and sex on the cover would indicate. This is the old "grab bag" game where the seller appeals to the prurient interest and "jacks up" the price which is nothing more than pandering and puts the publication in a category of a background of commercial exploitation of erotica solely for the sake of their prurient appeal.

A purchaser that came in to purchase the magazine "Solis" could not possibly know what was on the inside of the publication. The nude woman's picture on the cover of the magazine "Solis" appealed solely to the prurient interest of the purchaser and was so displayed to sell the magazine for an excessive profit. This Court in *Ginzburg* vs. *United States, supra,* stated:

> "If the object of a work is a material gain for the creator through an appeal to the sexual curiosity and appetite the work is pornographic."

The Court fully answers the questions involved in this case with the above quotation.

## CONCLUSION

It is respectfully submitted that the conviction of the petitioner violated none of his constitutional rights of the freedom of speech and press as he was not a nudist himself, a writer for nudist magazines, nor did he believe in nudism and that the findings of the Hustings Court of the City of Richmond, Virginia and the Supreme Court of Appeals of Virginia should stand undisturbed and it is respectfully prayed by the Commonwealth of Virginia that the petition for a writ of certiorari be not granted. The State is not punishing for a belief or idea of the seller, but the act of pandering sex and nudity in the public square.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA

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# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

ROSENBLOOM *v.* VIRGINIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 366. Decided June 12, 1967.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment of the Supreme Court of Appeals of Virginia is reversed. *Sunshine Book Co.* v. *Summerfield*, 355 U. S. 372.

MR. JUSTICE HARLAN adheres to the views expressed in his separate opinions in *Roth* v. *United States*, 354 U. S. 476, 496, and *Memoirs* v. *Massachusetts*, 383 U. S. 413, 455, and on the basis of the reasoning set forth therein would affirm.